UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF RHODE ISLAND

RODNEY BARBER,	:	
Plaintiff,	:	
vs.	:	C.A. NO.: 05-390-ML
VERIZON NEW ENGLAND INC.,	:	
Defendant.	:	

MEMORANDUM OF LAW IN SUPPORT OF
DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

Defendant Verizon New England Inc. ("Verizon") terminated the employment of Plaintiff Rodney Barber ("Mr. Barber") after he violated the terms of Verizon's disability benefit policy and its Code of Business Conduct by traveling to Las Vegas without the permission of Verizon's disability plan administrator while he was supposed to be on a paid disability leave. Despite this improper conduct – which an arbitration panel found to be a flagrant and knowing violation of Verizon's policies[1] – Mr. Barber now seeks to attribute his termination to discrimination on the part of Verizon in violation of the Rhode Island Fair Employment Practices Act (FEPA), RIGL § 28-5-1, *et seq.*, and the Rhode Island Civil Rights Act (RICRA), RIGL § 42-112-1, *et seq*. Specifically, Mr. Barber claims that he suffers from a disability, Hepatitis C, and that Verizon fired him because of that disability.

Mr. Barber's claims fail on the undisputed facts. First, Mr. Barber does not have a disability within the meaning of FEPA or RICRA. While Verizon does not dispute that Mr. Barber has hepatitis, there is no evidence to suggest that his hepatitis has substantially limited him in any major life activity. Indeed, Mr. Barber admitted in his deposition that the symptoms of which he now complains did not begin until early 2006 – two years *after* his termination.

[1] The arbitration panel reinstated Mr. Barber, but without back pay. He remains employed by Verizon to this day.

Second, even if Mr. Barber's hepatitis does constitute a disability, there is no evidence that Verizon acted with any discriminatory animus. On the contrary, the record establishes that Verizon terminated Mr. Barber for a clear violation of Verizon policies, as it did with another employee on disability leave who traveled to the same wedding without permission.

In short, on the undisputed facts, Verizon is entitled to judgment in its favor as a matter of law.

I. UNDISPUTED FACTS

Verizon incorporates by reference its Statement of Undisputed Facts ("Defendant's Statement") and accompanying exhibits.

II. ARGUMENT

To establish a *prima facie* case of disability discrimination under either FEPA or RICRA, an employee must prove that "(1) he or she was disabled within the meaning of FEPA and RICRA; (2) the employee was a 'qualified' individual, which means that 'with or without reasonable accommodation, she was able to perform the essential functions of her job'; and (3) 'the employer discharged her in whole or in part because of her disability.'" *DeCamp v. Dollar Tree Stores, Inc.*, 875 A.2d 13, 25 (R.I. 2005).[2] The time of the allegedly discriminatory act is the relevant time for determining whether an individual was disabled; whether he was disabled at some other time is of no consequence. *See, e.g., Koscis v. Multi-Care Mgt., Inc.*, 97 F.3d 876, 884 n.13 (6th Cir. 1996);[3] *Bailey v. Georgia-Pacific Corp.*, 176 F. Supp. 2d 3, 7 (D. Me. 2001) (citing *Nowak v. St. Rita High Sch.*, 142 F.3d 999, 1003 (7th Cir, 1998)), *aff'd*, 306 F.3d 1162

[2] The definition of "disability" is the same under both FEPA and RICRA. *See* RIGL § 28-5-6(4); RIGL § 42-112-1(d).

[3] Rhode Island courts will look to federal case law construing the ADA, given the similarities between the ADA and state law. *See, e.g., Evans v. Rhode Island Dep't of Bus. Reg.*, 2004 WL 2075132, *5 (R.I. Super. Ct. Aug. 21, 2004); *Tardie v. Rehabilitation Hosp.*, 6 F. Supp. 2d 125, 134 (D.R.I. 1998), *aff'd*, 168 F.3d 538 (1st Cir. 1999).

(1st Cir. 2002). *Cf. Hurley-Bardige v. Brown,* 900 F. Supp. 567, 570 (D. Mass. 1995) (time of discriminatory act is relevant time for determining disability under Rehabilitation Act).

On the undisputed facts, Mr. Barber cannot prove either the first or the third elements of this *prima facie* case.

A. Plaintiff Is Not Disabled, As He Is Not Substantially Limited In Any Major Life Activity.

In order to be "disabled," a plaintiff must have a "physical or mental impairment which substantially limits one or more major life activities." *DeCamp*, 875 A.2d at 25. The Rhode Island Supreme Court has noted that "proving disability for purposes of FEPA or RICRA is not a simple endeavor." *Id.* Similarly, the United States Supreme Court has stated that the terms "major life activity" and "substantially limits" must "be interpreted strictly to create a demanding standard for qualifying as disabled." *Toyota Motor Mfg. of Ky., Inc. v. Williams*, 534 U.S. 184, 196-97 (2002). It is not enough for a plaintiff simply to present evidence that he has a physical or mental impairment; he is disabled only if he can show that his impairment substantially limited him in a major life activity. *Id.* at 195.

1. Plaintiff suffered no symptoms from his hepatitis until two years after the allegedly discriminatory termination.

Initially, Mr. Barber's claims fail for one simple reason – his hepatitis was symptom-free until the Spring of 2006, *more than two years after he was fired*. Mr. Barber admits he had no symptoms when he first was diagnosed with hepatitis some time between 1994 and 1997, that he first experienced symptoms two or three months before his May 2006 deposition, that his hepatitis has had no impact on his work, and that he never asked Verizon for any type of accommodation. Defendant's Statement, ¶¶ 1-8, 15, 16. In fact, the only changes Mr. Barber has made to his lifestyle are to avoid fried, fatty, and spicy foods – sound advice for anyone. *Id.* ¶¶ 9-10.[4]

Even if Mr. Barber could prove that he *ever* was substantially limited in a major life activity (and Verizon contends he cannot), his own admissions prove that he was *not* substantially limited in any major life activity at the only time that matters – the time of the allegedly discriminatory termination. Verizon is entitled to summary judgment on this basis alone.

2. Plaintiff is not substantially limited in any major life activity.

Regardless of the timing of Mr. Barber's symptoms, he has not identified any major life activity in which he was substantially limited. In his answers to Verizon's interrogatories, Mr. Barber identified "fatigue" and "sleep wake cycle" as limitations. Defendant's Statement, ¶ 4.[5] At his deposition, he added nausea, decreased sexual functioning, and the inadvisability of having children. *Id.* ¶¶ 8, 12, 13.[6] Several of these are not even major life activities and, in any case, Mr. Barber has not demonstrated any substantial limitation in them.

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[4] Toward the end of his deposition, Mr. Barber attempted to "correct" the testimony about his lifestyle by claiming that he is limited in his sexual activity and ability to procreate. As discussed below, his claims – for which he offers no competent evidence – do not establish that he was substantially limited in a major life function, or that these alleged limitations have anything to do with his hepatitis.

[5] Mr. Barber stated in his deposition that other than fatigue, problems with his sleep-wake cycle, avoiding fried, fatty, and spicy foods, and worrying about his health, the hepatitis has had no affect on his life. As noted, Mr. Barber later tried to supplement this testimony by asserting (not in response to any question) that he also had sexual difficulties. *Id.* ¶¶ 11, 12.

[6] In his amended expert disclosures, Mr. Barber identifies the additional areas of "sexual functioning, strength, and symptoms of depression" by stating that "Dr. Emgushov would testify as to the effect Mr. Barber's diagnosis has on … sexual functioning, strength, [and] symptoms of depression." However, Magistrate Judge Martin's September 25, 2006 Order bars Mr. Barber from introducing any expert affidavit that "contains factual information or opinion which is not *explicitly* and *fully* stated in [Mr. Barber's disclosures]." (Emphasis added.) Mr. Barber's disclosure provides absolutely nothing beyond identifying these as purportedly major life activities. The disclosure does not even indicate that Dr. Emgushov believes Mr. Barber to have been substantially limited in these functions, but merely that a hepatitis diagnosis may have an "effect" on these functions.

(a) Fatigue

While it may be a symptom of a physical condition, "fatigue" itself is not a major life activity; indeed, it is not an "activity" at all. *See Sussle v. Sirina Protection Sys. Corp.*, 269 F. Supp. 2d 285, 300 (S.D.N.Y. 2003) ("Since fatigue in and of itself does not constitute an 'activity,' suffering from fatigue cannot qualify as a major life activity."). Moreover, Mr. Barber describes no meaningful limitation on his daily activities resulting from this alleged fatigue. He recognizes that "we all get fatigued," and simply notes that he has felt "a little bit extra" fatigued during the day or in the evening (and again, only in the early part of 2006). Defendant's Statement, ¶ 7. Mr. Barber speculates that this fatigue has affected his mental abilities, but no one has ever told him that is the case, and his alleged loss of mental acuity has had no impact on his work. *Id.* ¶ 14. This testimony falls far short of the evidence needed to establish a substantial limitation in a major life activity. *See Pimentel v. City of New York*, 13 A.D. Cas. (BNA) 1216, 1227, 2001 WL 1579553, *13 (S.D.N.Y. 2001) (plaintiff with hepatitis was not substantially limited in a major life activity, even though Interferon treatments caused "not sleeping well at night, going to the bathroom more frequently, taking more time to sign in at work in the morning, and being fatigued from walking around the office during the day")[7]; *Rodgers v. Norfolk Southern Corp.*, 304 F. Supp. 2d 961, 967 (S.D. Ohio 2003) (fatigue resulting from hepatitis did not substantially limit plaintiff in a major life activity where she was required to rest eight to 12 hours between shifts and was unable to work "from time to time when she is symptomatic").

[7] The subsequent history of *Pimentel* indicates that it was reversed on reconsideration. In fact, this "reversal" pertained to a single count of the complaint, as to which the judge originally had denied the defendant's summary judgment motion. On reconsideration, the judge ruled in favor of the defendant on that count, as well, granting complete summary judgment to the defendant. *Pimentel v. City of New York*, 2002 WL 977535 (S.D.N.Y. May 14, 2002), *aff'd*, 74 Fed. App. 146 (2d Cir. 2003).

(b) Sleeping

Sleeping may be considered a major life activity. *See, e.g., Cornwell v. Dairy Farmers of Am., Inc.*, 369 F. Supp. 2d 87, 16 (D. Mass. 2005). However, the relatively mild sleep disturbances that Mr. Barber describes are not a substantial limitation on his ability to sleep. Mr. Barber testified that he has trouble falling asleep two to four times per month, and frequently wakes up in the middle of the night for an hour or two. Defendant's Statement, ¶ 6.

Courts have found that much more severe difficulties were *not* substantial limitations on sleeping. *See, e.g., Scheerer v. Potter*, 443 F.3d 916, 920 (7th Cir. 2006) ("substantial limitation in the major life activity of sleeping" requires proof of "prolonged, severe and long-term sleep difficulties") (citing *Pack v. Kmart Corp.,* 166 F.3d 1300, 1306 (10th Cir. 1999)); *Nuzum v. Ozark Auto. Distribs., Inc.*, 432 F.3d 839, 848 (8th Cir. 2005) (sleeping four to five hours per night, two and a half hours at a time, was not substantial limitation on sleeping); *Rieger v. Orlor, Inc.*, 427 F. Supp. 2d 105, 118 n.49 (D. Conn. 2006) (collecting cases holding that amounts of sleep under six hours per night, and even as few as two to three hours per night, do not constitute substantial limitations on sleeping). In short, what Mr. Barber describes is a typical night's sleep for millions of average Americans, not a substantially limiting disability.

(c) Nausea

As with "fatigue," nausea is a symptom, not a major life activity; being nauseated hardly is an activity of central importance to most people's lives. In any event, Mr. Barber claims that he experiences nausea only "[a] couple of times a month." Defendant's Statement, ¶ 8. Furthermore, Mr. Barber does not know whether the nausea is related to his hepatitis and cannot remember any doctor ever telling him so. *Id.* The infrequent nausea that Mr. Barber claims to experience is in no sense substantially limiting.

(d) Decreased sexual functioning

Courts are split on whether engaging in sexual relations is a major life activity. *Compare, e.g., Powell v. City of Pittsfield,* 221 F. Supp. 2d 119, 147 (D. Mass. 2002) (holding sexual intercourse to be a major life activity), *aff'd,* 391 F.3d 1 (1st Cir. 2004), *with Soler v. Tyco Electronics, Inc.,* 268 F. Supp. 2d 97, 106 (D.P.R. 2003) (holding that sexual intercourse is not a major life activity). Assuming *arguendo* that sexual intercourse is a major life activity, Mr. Barber does not establish that he was substantially limited in that activity by virtue of his hepatitis. Mr. Barber's sole evidence on this subject is his own testimony that the frequency with which he had sexual intercourse dropped from once every few days to a few times per year.[8] Defendant's Statement, ¶ 12. However, several courts – including two within the First Circuit – have found that a plaintiff's own testimony about the frequency of his sexual relations is insufficient to establish a substantial limitation. *See Soler,* 268 F. Supp. 2d at 106 ("This decrease in the frequency of sexual intercourse, by itself, is not sufficient to establish a substantial limitation."); *Whitney v. Wal-Mart Stores, Inc.,* 16 A.D. Cas. (BNA) 840, 847, 2004 WL 2792297, *8 (D. Me. Dec. 3, 2004) (plaintiff's testimony that frequency of sexual intercourse decreased to four to six times per year was "limited and subjective evidence [that was] simply insufficient to demonstrate a substantial limitation"). *See also Contreras v. Suncast*

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[8] Mr. Barber speculates that his hepatitis is the cause of his decreased sexual activity, though he admits he has neither sought nor received any medical opinion to support this belief. Defendant's Statement, ¶ 12. His unsupported belief cannot establish a link between his hepatitis and the frequency with which he engages in sexual intercourse. *See Sussle,* 269 F. Supp. 2d at 306-07 (plaintiff with hepatitis could not establish link between hepatitis and limitation on sexual activity because only evidence was his own testimony to this effect). While, at least in ADA cases within the First Circuit, "[t]here is certainly no general rule that medical testimony is always necessary to establish disability," *Katz v. City Metal Co.,* 87 F.3d 26, 32 (1st Cir. 1996), such testimony may well be necessary where the alleged disability is not obvious to a lay jury. *Id.* It is far from obvious that a disease affecting the liver would have any impact on a person's sexual functioning, and Mr. Barber's speculation that it does is both unhelpful and inadmissible. *Cf. Powell,* 221 F. Supp. 2d at 147 (plaintiff presented medical testimony establishing the transmission of Hepatitis C through sexual activity and showing that "if [plaintiff] engaged in sexual relations with his wife for purposes of reproduction or marital intimacy, he ran a risk of infecting her with a deadly disease") (footnote omitted).

Corp., 237 F.3d 756, 764 (7th Cir. 2001) ("[A] bald declaration [about plaintiff's frequency of sexual intercourse], without anything more, cannot create a genuine issue of material fact as to [plaintiff] being disabled that would preclude summary judgment.").

Furthermore, Mr. Barber cannot claim to be substantially limited in his sexual relations without establishing the frequency with which the average person has sex. *See* 29 C.F.R. § 1630.2(j)(1)(ii) ("The term substantially limits means … [s]ignificantly restricted as to the condition, manner or duration under which an individual can perform a particular major life activity *as compared to the condition, manner, or duration under which the average person in the general population can perform that same major life activity*.") (emphasis added). In the absence of evidence regarding the sexual habits of average Americans, there is no way for a jury to evaluate how limited Mr. Barber may be compared to the general population, and, therefore, no way for Mr. Barber to establish that he is substantially limited in his ability to have sexual relations.

(e) Inadvisability of having children

Finally, Mr. Barber claims that he cannot safely have children because of his hepatitis. The United States Supreme Court has established that reproduction is a major life function. *Bragdon v. Abbott*, 524 U.S. 624, 639 (1998).[9] Again, however, Mr. Barber has no competent evidence to establish that he is substantially limited in his ability to procreate. The only bases for his assertion that he cannot have children are an alleged statement by an unidentified doctor that the doctor "did not know what the medicine would do," and an alleged statement by an unnamed

[9] Whether *Bragdon* held that sexual intercourse itself is a major life activity is unclear. The Court stated that "[r]eproduction and the sexual dynamics surrounding it are central to the life process itself," *id.* at 638, but its specific holding simply was that "we agree with the Court of Appeals' determination that reproduction is a major life activity for the purposes of the ADA." *Id.* at 639. The distinction is academic in the present case, since, as argued above, Mr. Barber cannot establish that he was substantially limited in his sexual relations.

person (not even identified as a doctor) that “that there is a 1 to 2 percent chance” of passing hepatitis on to a child. Defendant’s Statement, ¶ 13.

These statements are rank hearsay and inadmissible. Consequently, Mr. Barber has no evidence he could present to a jury on the effect, if any, that his hepatitis may have on his ability to have children. Even if this evidence were admissible, it provides a jury with no guidance for evaluating whether an unknown effect of medication and a “1 to 2 percent chance” of passing hepatitis to a fetus constitute a substantial limitation on Mr. Barber’s ability to father a child. *See Sussle,* 269 F. Supp. 2d at 306-07 (plaintiff could not establish substantial limitation in reproduction without “specific information regarding the degree to which Hepatitis C limited his reproductive and sexual activities”). Mr. Barber cannot, therefore, establish that he is substantially limited in the major life activity of reproduction.

B. Plaintiff Cannot Show That He Was Discharged Because Of His Hepatitis.

Even if Mr. Barber could establish that he had a disability during the relevant period of time (which, as argued above, he cannot), he presents no evidence from which a jury could conclude that Verizon acted out of any bias arising from his medical condition. It is undisputed that Verizon’s disability benefits policy required Mr. Barber to obtain permission from the plan administrator, MetLife, before traveling to Las Vegas; that Mr. Barber neither sought nor obtained that permission; that his failure to do so was a violation not only of the disability plan but also of Verizon’s Code of Business Conduct; and that Verizon terminated another employee who traveled to the same wedding without permission while on disability leave. *See* Defendant’s Statement, ¶¶ 17-20; 31-41; 48. Indeed, a panel of three arbitrators concluded, after a two-day evidentiary hearing, that Mr. Barber flagrantly and knowingly violated Verizon’s policy, and that he deserved a stiff punishment for doing so. *Id.* ¶¶ 45-47.

Against this evidence, Mr. Barber offers nothing more than rank speculation about Verizon's motives. Beliefs and feelings, however, cannot support a claim of discrimination. *See Ruiz v. Posadas de San Juan Assoc.*, 124 F.3d 243, 248-49 (1st Cir. 1997) (plaintiff's subjective belief that articulated reasons for termination were pretextual is insufficient to state claim for discriminatory termination). Thus, Mr. Barber fails to establish this element of his *prima facie* case.

1. The arbitration panel concluded that Mr. Barber's conduct was a serious violation of Verizon policies.

Perhaps the most compelling evidence that Verizon acted for legitimate, non-discriminatory reasons comes from the arbitration panel that considered Mr. Barber's Union grievance. That panel conducted a two-day evidentiary hearing to determine whether Verizon had "just cause" within the meaning of the Collective Bargaining Agreement to terminate Mr. Barber's employment. Defendant's Statement, ¶ 45.[10] Based on the evidence from that hearing, the panel issued an opinion in excess of 40 pages, concluding, among other things, that Mr. Barber knowingly violated Verizon's policy requiring him to obtain permission before traveling. *Id.* ¶ 46. While the panel decided that termination was too harsh a punishment and ordered Mr. Barber reinstated, it also found that Mr. Barber's conduct warranted severe discipline. Consequently, the panel refused to award Mr. Barber back pay, effectively converting Verizon's termination into a nine-month unpaid suspension. *Id.* In fact, the panel specifically allowed Verizon to place "an appropriate letter of suspension" in Mr. Barber's file. *Id.* ¶ 47.

[10] Whether Verizon had "just cause" to fire Mr. Barber is not a question that is before this Court. The question is not whether Verizon had a right under the Collective Bargaining Agreement to take the action it did, but whether Verizon fired Mr. Barber because of his alleged disability. In the course of making its determination, however, the panel considered much of the same evidence that would be presented to a jury in the present case, and its factual findings are relevant to the issues here.

The language that the panel used in describing Mr. Barber's conduct was particularly harsh, and left no doubt of its conclusion that Mr. Barber had committed a serious breach of Verizon's trust:

> The Panel is convinced that Mr. Barber knew he should have contacted MetLife for permission before traveling to Las Vegas. Maybe he put off getting permission because, as he testified, he did not know up until the last minute whether he would feel well enough to go. On the other hand, maybe he felt close enough to the end of his already-approved disability period that he was willing to roll the dice and take his chances….
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> … [T]he panel views his decision to go to Las Vegas as particularly and uniquely flagrant. Mr. Barber has a serious illness. His Company and the Company's claims administrator took his illness seriously and compensated him while he attempted recovery. Mr. Barber's period on disability was lengthy, and no doubt costly to the Company. For him, at the end of that combined lengthy period, to fly to Las Vegas of all places, is such an "in your face" act that it warrants a serious disciplinary response. It would be difficult to create a scenario which would be more corrosive to how other employees view the necessity to follow Plan requirements than was Mr. Barber's decision at the end of a long period of coverage to go to Las Vegas….

Id. ¶ 46.

This Court is not bound as a matter of law to adopt the panel's factual findings. *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 59 (1974). However, "[t]he arbitral decision may be admitted as evidence and accorded such weight as the court deems appropriate." *Id.* at 59-60. Indeed, the Supreme Court noted that such evidence would be particularly relevant "where the issue is solely one of fact, specifically addressed by the parties and decided by the arbitrator on the basis of an adequate record." *Id.* at 60 n.21. *Cf. Collins v. New York Trans. Auth.*, 305 F.3d 113, 119 (2d Cir. 2002) (arbitration panel's determination that plaintiff's termination was proper was "highly probative of the absence of discriminatory intent").

A case out of the Southern District of New York is strikingly similar. In *Tomasino v. Mount Sinai Medical Center and Hospital,* 2003 WL 1193726 (S.D.N.Y. Mar. 13, 2003),[11] a

[11] A copy of *Tomasino,* an unreported decision, is attached for the Court's convenience as Exhibit A.

nurse brought a claim against the hospital that employed her under the Age Discrimination in Employment Act after the hospital terminated her for violating a policy regarding the administration of morphine. Prior to the lawsuit, the nurse had filed a grievance through her union, and the grievance ultimately resulted in a five-day evidentiary hearing before an arbitral panel. The panel issued a 22-page decision, in which it agreed that the nurse had violated hospital policy, but concluded that termination was too harsh. Instead, the panel reinstated the nurse without back pay, effectively converting her termination into a lengthy suspension. *Id.* at *5-6.

The district court rejected the hospital's argument that the arbitrator's decision had preclusive effect. *Id.* at *11. However, the court found that "the Arbitrator's decision … is entitled to great weight as to his factual findings." *Id.* at *12. The court also observed that, "in order to survive Mt. Sinai's motion for summary judgment, Tomasino 'must present strong evidence that the [arbitrator's] decision was wrong as a matter of fact or that the impartiality of the proceeding was somehow compromised.'" *Id.* at *13 (quoting *Collins,* 305 F.3d at 119). Finding such "strong evidence" lacking, the court adopted the arbitrator's conclusion that the nurse had, in fact, been terminated for the legitimate reasons that the hospital had articulated. *Id.*

The same reasoning should apply here. The arbitrators in this case determined that the punishment given to Mr. Barber was too harsh, but also concluded that Mr. Barber had, in fact, flagrantly violated Verizon's policy requiring permission to travel while on disability leave. They reached this conclusion after two days of hearings in which both sides presented witnesses and documentary evidence and were represented by counsel. The panel presented its findings in a lengthy and carefully reasoned written opinion.[12] The arbitrators' decision, therefore, is powerful evidence of the legitimacy of Verizon's actions, and Verizon respectfully suggests that this Court can and should adopt the panel's factual findings as its own.

2. *Verizon terminated another employee who traveled to the same wedding without permission while on disability leave.*

Equally powerful is the undisputed evidence that another employee, Sandra Hurt ("Ms. Hurt"), was on disability leave, attended the same wedding in Las Vegas, failed to get permission to travel, and was fired. Defendant's Statement, ¶ 48. Mr. Barber claims, in his answers to interrogatories, that "[o]ther co workers [sic] in the same situation were only suspended not terminated from their position but I was." *Id.* ¶ 49. However, Mr. Barber does not know the names of these alleged co-workers, nor whether they were on disability leaves or simply out sick for a few days. In fact, he received all of his alleged information second-hand from the president of the Union. *Id.* ¶ 50. Mr. Barber's testimony on this point is inadmissible speculation founded upon inadmissible hearsay, and Verizon's evidence stands unrebutted.

3. *Plaintiff has no evidence beyond his own musings to support his contention that Verizon acted with discriminatory intent.*

Mr. Barber's deposition testimony demonstrates the complete absence of any evidence from which a jury could conclude that Verizon discriminated against him because of his hepatitis. Mr. Barber speculates that Verizon wanted to get rid of him because he was a "nonproductive employee." However, the only statement anyone at Verizon ever made to him with respect to being "nonproductive" was being told that when he took half-days off (as opposed to disability leave), that would be coded as "nonproductive time," which is the designation Verizon gives to personal time off; his disability leaves were not coded as

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[12] Given the length of the opinion, Verizon has submitted only those portions to which it makes specific reference. Should the Court wish to review the opinion in its entirety, Verizon, of course, would be happy to provide it.

"nonproductive time." *Id.* ¶ 51. By Mr. Barber's own admission, no one at Verizon ever told him he was an unproductive employee, or that they wanted to get rid of him because of a lack of productivity, or that Verizon viewed him as a liability. *Id.* ¶¶ 52, 53. In fact, Mr. Barber's sole basis for concluding that Verizon viewed him as a liability is other employees' alleged statements to him that they thought he should not have been terminated and believed Verizon terminated him because he was sick, *id.* ¶ 54 – statements that constitute irrelevant, speculative, and inadmissible hearsay.

Mr. Barber's evidence relating specifically to his managers is similarly lacking. He contends that Joseph Conway, Lorna Deplitch, and Sharon Mello discriminated against him, but admits that he was on friendly terms with Ms. Mello, that he had virtually no interactions of any kind with either Mr. Conway or Ms. Deplitch, and that he did not even meet Mr. Conway or Ms. Deplitch until *after* his termination. *Id.* ¶¶ 25-30. The sole bases for Mr. Barber's claim that Mr. Conway discriminated against him are his belief that Mr. Conway could have chosen a punishment less severe than termination but did not, and that *after* Mr. Barber returned following his reinstatement by the arbitrator, Mr. Conway allegedly tried to make him work night shifts. *Id.* ¶ 55. These beliefs are wholly irrelevant, even if true, as they occurred *after* the allegedly discriminatory termination. Moreover, Mr. Barber admits that after he submitted a doctor's note stating that he should not work nights, Mr. Conway dropped the subject and Mr. Barber was not, in fact, required to work night shifts. *Id.*

As to Ms. Deplitch – the individual who decided that Mr. Barber's employment should be terminated – Mr. Barber merely speculates (while acknowledging that he "can't guess what's in her head") that she saw his violation of the travel policy as an opportunity to get rid of him. *Id.* ¶¶ 42, 56. Finally, his basis for claiming that Ms. Mello discriminated against him is his belief that she was "following the consensus" from Mr. Conway and Ms. Deplitch that he should be terminated; in other words, that she did not try to stop him from being terminated. *Id.* ¶ 57.

In short, Mr. Barber offers nothing more than speculation founded upon hearsay to support his claim that Verizon discriminated against him.[13] By contrast, Verizon offers clear evidence that Mr. Barber violated the terms of its disability benefits plan and its Code of Business Conduct, and that other employees who did so were given the same punishment. On these undisputed facts, Mr. Barber's claims fail as a matter of law.

III. CONCLUSION

For the foregoing reasons, Verizon respectfully requests that the Court enter summary judgment in its favor on all counts of the Complaint and award Verizon the costs of this action.

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[13] Mr. Barber's amended expert disclosure states that Dr. Emgushov "would testify that Mr. Barber traveling to Las Vegas in 2003 had no affect [sic] on his treatment nor his recovery time." Apart from the fact that the disclosure contains no information whatsoever on the details of or basis for this opinion (and per Magistrate Judge Martin's order, Mr. Barber will not be able to provide those details by way of an affidavit), it is irrelevant even if true. It is undisputed that Mr. Barber did not seek MetLife's permission to travel or advise MetLife in any way of his plans, thus depriving MetLife of the opportunity even to evaluate whether Mr. Barber's trip to Las Vegas would be appropriate. Mr. Barber violated Verizon's policy the moment he left for Las Vegas without permission, regardless of what actual impact the trip had on his health, and regardless of what MetLife might or might not have concluded if Mr. Barber had sought permission to travel as he was required to do.

(617) 227-4420 (fax)

CERTIFICATE OF SERVICE

I, the undersigned, hereby certify that on the 2nd day of October, 2006, I caused a copy of the foregoing to be served by first-class mail on:

Bruce P. Gladstein, Esq.
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/s/ Raymond M. Ripple
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EXHIBIT A